



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diemaster Tool, Inc.--Reconsideration

File: B-238877.4

Date: March 20, 1991

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Dunnells, Duvall & Porter, for the protester.
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participated in the preparation of the decision.

DIGEST

Request for reconsideration of decision dismissing protester's supplemental protest as untimely is denied where, by waiting until after its initial protest was dismissed without receiving an agency report and more than 5 weeks after notice of the award to file a Freedom of Information Act request, protester did not diligently pursue information which may have revealed additional ground of protest.

DECISION

Diemaster Tool, Inc. requests that we reconsider our decision in Diemaster Tool, Inc., B-238877.3, Nov. 7, 1990, 91-1 CPD ¶ 162, in which we dismissed as untimely Diemaster's supplemental protest challenging the award of a contract to Textron Lycoming under invitation for bids (IFB) No. DAAJ09-90-B-0050, an approved source solicitation issued by the Department of the Army for 1,020 turbine shafts, a critical flight safety part for the T-53 helicopter engine.

We deny the request for reconsideration.

The solicitation contemplated the award of a firm, fixed-price supply contract and restricted the competition to approved sources, specifically Diemaster and Textron, the original equipment manufacturer. Clause I-2 of the solicitation, referencing Federal Acquisition Regulation (FAR) § 52.209-1 (FAC 84-39), generally described the government's qualification requirements for testing or other quality assurance demonstration to be completed before award. In its bid, Textron completed clause I-2(c) concerning its previous compliance with the standards specified for qualification by listing itself and KHD as the manufacturers of the turbine

shaft which had been supplied under a 1986 contract. Textron was the apparent low bidder and Diemaster was the second low bidder. The contracting officer determined that Textron was a responsible contractor, and on February 27, the agency awarded the contract to Textron.

On March 9, Diemaster filed a protest alleging, among other things, that Textron submitted an unreasonably low-priced bid that would not cover its costs and which represented a "buy-in." Diemaster included with its protest a request that the agency release relevant documents such as Textron's contract as part of the agency's administrative report. On March 22, the agency filed a request for summary dismissal of Diemaster's protest arguing that the protester essentially was challenging the contracting officer's affirmative determination of Textron's responsibility. On March 29, Diemaster filed its opposition to the agency's request for summary dismissal. Diemaster apparently believed that despite this pending request, the agency would file its report on April 13, at which time Diemaster would receive relevant documents, including a copy of Textron's contract, and that following its submission of comments, our Office would proceed to decide its protest on the merits. However, prior to the submission of the agency report, our Office, on April 5, dismissed Diemaster's protest. Diemaster Tool, Inc., B-238877, Apr. 5, 1990, 90-1 CPD ¶ 375.

In Diemaster Tool, Inc., B-238877, supra, we held that Diemaster's allegation that Textron submitted a below-cost or "buy-in" bid did not provide a basis of protest because a bidder, for various reasons, in its business judgment, may decide to submit a below-cost bid, and such a bid is not invalid. Select Investigative Servs., Inc.--Recon., B-235768.3, Aug. 1, 1989, 89-2 CPD ¶ 94. We explained that whether an awardee can perform the contract at the price offered is a matter of responsibility which our Office will not review absent a showing of possible fraud or bad faith or that definitive responsibility criteria have not been met. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1990); Trak Eng'g, Inc., B-231791, Oct. 28, 1988, 88-2 CPD ¶ 402. Diemaster made no such allegation concerning the contracting officer's affirmative determination of responsibility. We further stated in our decision that an unreasonably low-priced bid may not be rejected under FAR § 14.404-2(f) (FAC 84-58) (providing for rejection of a bid where it is unreasonable as

to price) solely because of its low price where the bidder is found to be responsible by the contracting officer. See generally North Am. Laboratories of Ohio, Inc., 58 Comp. Gen. 724 (1979), 79-2 CPD ¶ 106.1/

On April 18, following our dismissal of its initial protest and more than 5 weeks after having been notified of the award to Textron, Diemaster requested from the agency, pursuant to Freedom of Information Act (FOIA) procedures, several documents, including Textron's contract. On June 20, Diemaster received the FOIA documents, including a copy of the contract awarded to Textron. On July 5, based on the FOIA documents released by the agency, Diemaster filed a supplemental protest with our Office alleging that the agency improperly awarded the contract to Textron which was ineligible for award because Textron's designated subcontractor for all of the manufacturing effort, KHD, was unqualified and unapproved under the material qualification requirements of the solicitation.

On November 7, we dismissed Diemaster's supplemental protest as untimely because it waited more than 5 weeks after it was notified of the award to Textron to file its FOIA request. Diemaster Tool, Inc., B-238877.3, supra. In this regard, we stated that a protester who challenges an award on one ground should diligently pursue information which may reveal additional grounds of protest concerning a competitor's offer and that separate grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements of our Bid Protest Regulations. See Robinson Indus., Inc.--Recon., B-194157.2, Mar. 14, 1980, 80-1 CPD ¶ 197. Where a protest is based on information disclosed pursuant to FOIA, the protest will be considered timely if it is filed within 10 working days after the information is received, provided that the protester diligently pursued the release of the information under FOIA. Robbins-Gioia, Inc., B-229757, Dec. 28, 1987, 87-2 CPD ¶ 632. In this case, we concluded that by waiting over 5 weeks after it received notice of the award to file its FOIA request, Diemaster did not diligently pursue within a reasonable time information upon which its supplemental protest was based. See Finkelstein Assocs., Inc., B-237441, Nov. 22, 1989, 89-2 CPD ¶ 497; Heroux, Inc., B-237432.2, June 8, 1990, 90-1 CPD ¶ 542.

1/ Diemaster still disagrees with our interpretation that under FAR § 14.404-2(f) an unreasonably low-priced bid may not be rejected solely because of its low price where the bidder is found responsible. Here, as we stated in our prior decision, there is no evidence to suggest that Textron's low-priced bid was below-cost, and, therefore, Diemaster's argument is academic.

In its request for reconsideration filed on November 28, Diemaster contends that the fact it did not learn of the additional basis of protest until almost four months after the award to Textron was a result of our "unwarranted action" in summarily dismissing its initial protest prior to receiving the agency report. Diemaster, reiterating the chronology of events, argues that it diligently pursued its FOIA request following our dismissal of its initial protest. Diemaster essentially maintains that had our Office not dismissed its initial protest, it would have learned of its supplemental basis of protest at the time it received the agency report without having to initiate a FOIA request for the relevant information.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a). Repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. Diemaster has failed to make the required showing.

With respect to Diemaster's contention that our decision to dismiss its initial protest without receiving the agency report was unwarranted, our Bid Protest Regulations clearly state that we may summarily dismiss a protest without requiring an agency to submit a report when on its face a protest does not state a valid basis of protest, is untimely, or otherwise not for consideration by our Office. 4 C.F.R. § 21.3(m); see 31 U.S.C. § 3554(a)(3) (1988). Further, when the propriety of such a dismissal becomes clear only after information is provided by the agency, we may dismiss the protest at that time without receiving the agency's report. Id.

Here, Diemaster's initial protest allegation--that Textron submitted an unreasonably low-priced bid that would not cover its costs and represented a "buy-in"--did not provide a valid basis of protest because below-cost bids are not illegal or improper and the contracting officer made an affirmative determination that Textron was a responsible bidder which could perform the contract at the price it offered. Despite the fact that our Office initially requested an agency report, we were not precluded from considering the agency's subsequent request for summary dismissal. Diemaster knew that the agency requested dismissal of its protest as evidenced by its filing of an opposition to the request. After considering the respective positions of both Diemaster and the agency, we

properly dismissed Diemaster's initial protest in accordance with our Bid Protest Regulations which provide that protests which involve an affirmative determination of an awardee's responsibility may be dismissed without receiving an agency report. 4 C.F.R. § 21.3(m) (5).

Bid protests are serious matters which require effective and equitable procedural standards assuring a fair opportunity to have objections considered consistent with the goal of not unduly disrupting the procurement process. See Amerind Constr. Inc.--Recon., B-236686.2, Dec. 1, 1989, 89-2 CPD ¶ 508. Accordingly, our Bid Protest Regulations, 4 C.F.R. Part 21, contain strict timeliness requirements for filing protests, and to ensure those requirements are met, an affirmative obligation is imposed on the protester to diligently pursue information that forms the basis for its protest. See Illumination Control Sys., Inc., B-237196, Dec. 12, 1989, 89-2 CPD ¶ 546.

Here, the protester, in its initial protest, expected to receive a copy of Textron's contract and other specified information as part of the original protest process. The protester then apparently intended to use this information to file any additional protest grounds. Bid protests were not intended to be employed as an alternative to an FOIA request. Where, as here, the protester does file its protest as a means of obtaining additional information, it does so at its own peril since a protest may be dismissed at any time (including prior to the receipt of the agency report) where it fails to state a valid basis for protest. 4 C.F.R. § 21.3(m). On this record, we remain of the view that by waiting more than five weeks after notice of the award to Textron to file its FOIA request, and only after our Office dismissed its initial protest without receiving an agency report, Diemaster did not diligently pursue information which may have revealed a possible additional ground of protest concerning Textron's bid.

The request for reconsideration is denied.


James F. Hinchman
General Counsel